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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1965

NO. 1018

WARD LANE, As Warden of the Indiana State Prison,
Respondent

v

ARNOLD G. HOBBS,
Petitioner

PETITION FOR CERTIORARI TO THE SUPREME COURT OF INDIANA

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THE OPINION BELOW

The opinion of the Supreme Court of the State of Indiana was entered on June 24, 1965, and is reported in ..... Ind. .....; 208 NE2nd 182. The majority opinion, the concurring opinion and the dissenting opinion of the Judges of the Supreme Court of Indiana are attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Indiana was entered on the 24th day of June, 1965. The petition for rehearing was filed July 12, 1965, within the time fixed by the rules, which petition for rehearing is set out in full in the transcript in this cause. (R. 126-136) The petition for rehearing was denied on the 22nd day of September, 1965, without written opinion. The time within which to file this petition for writ of certiorari was extended to and including the 19th day of February, 1966, by order of the Hon. Justice Tom C. Clark of the Supreme Court of the United States, which order was entered on the 14th day of December, 1965.

THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION

This court's jurisdiction over this petition for certiorari is conferred by Title 28, United States Code Annotated, Sec. 1257, Subparagraphs 1, 2, and 3, which authorizes this court to grant certiorari to review judgments of state courts on petitions filed 90 days from the date of such final judgment, and/or within the time fixed under an extension by order of a Justice of the United States Supreme Court.

THE QUESTIONS PRESENTED

When the petitioner, appellee below, filed his petition for habeas corpus with the LaPorte Circuit Court, LaPorte County, Indiana, a court of competent jurisdiction, charging in his petition that he was being illegally restrained of his liberty and therefore deprived of his constitutional rights by the respondent appellant, and the trial court, on hearing, found that the appellee had served the legal portion of his sentence and was entitled to be released and was then being illegally restrained of his liberty, and therefore ordered appellee released and discharged from the custody of the appellant respondent; therefore, on appeal, did the Supreme Court of Indiana deprive the appellee of his constitutional right to habeas corpus as guaranteed by Article I, Sec. 9 of the Constitution of the United States, and deny him due process

of law and equal protection of the laws as guaranteed by the 14th amendment to the Constitution of the United States, by ordering the appellee petitioner remanded to the custody of the appellant respondent?

Further, did the Supreme Court of Indiana, by its decision herein, deprive petitioner of his constitutional right as guaranteed under Article I, Section 14, of the Constitution of Indiana, and under the Fifth Amendment of the United States Constitution, which is made applicable to the State of Indiana through the 14th Amendment of the United States Constitution, by holding that the petitioner was required to speak out during the course of the original trial?

THE FEDERAL AND STATE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The applicable United States Constitutional provisions involved in this appeal are, to-wit:

1. Article I, Section 9, part 2 of the Constitution of the United States, which is:

> (2) The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

2. The Fifth Amendment to the Constitution of the United States, to-wit:

> Criminal actions—Provisions concerning—Due Process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Fourteenth Amendment, Section 1, to the United States Constitution, to-wit:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Applicable provisions of the Constitution of the State of Indiana are Article I, Section 14, which is:

> "Former jeopardy—Self-incrimination.— No person shall be put in jeopardy twice for the same offense. No person, if any criminal prosecution, shall be compelled to testify against himself."

Another applicable provision of the Constitution of Indiana is Article I, Section 27, which is as follows:

> "Suspension of habeas corpus.—The privilege of the writ of habeas corpus shall not be suspended, except in case of rebellion or invasion; and then, only if the public safety demand it."

The statutes of the State of Indiana applicable are:

Indiana Acts of 1881, Special Session, Chapter 38, Section 778 as found in Burns Indiana Statutes, 1946 Replacement, Section 3-1901, which is as follows:

> "Who may have writ.—Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of the restraint, and shall be delivered therefrom when illegal."

Also, Indiana Acts of 1881, Special Session, Chapter 38, Section 789, as found in Burns Indiana Statutes 1946 Replacement, Section 3- 1917, which is as follows:

"Hearing—When party discharged.—The court or judge shall thereupon proceed, in a summary way, to hear and determine the cause; and if no legal cause be shown for the restraint or for the continuation thereof shall discharge the party."

Indiana Acts of 1927, Chapter 200, Section 1, as found in Burns Indiana Statutes, 1956 Replacement, Section 9- 1819, which is as follows:

"Verdict—Assessment of fine or punishment.—When the defendant is found guilty the jury, except in the cases provided for, in the next three (two) sections, must state, in the verdict, the amount of fine and the punishment to be inflicted; where the plea is guilty, or the trial is by the court, the court, subject to the same exception, shall assess the amount of fine and fix the punishment to be inflicted."

The Indiana Acts of 1905, Chapter 169, Section 392, Indiana Acts of 1931, Chapter 159, Section 1, Indiana Acts of 1935, Chapter 233, Section 1, as found in Burns Indiana Statutes, 1956 Replacement, Section 10-1704, which is as follows:

"Private employees.—Every officer, agent, attorney, clerk, servant or employee of any person, firm, corporation, association, bank, trust company, financial institution or broker, who, having access to, control or possession of any money, article or thing of value, to the possession of which his employer is entitled, shall, while in such employment, take, purloin, secrete or in any way whatever appropriate to his own use, or to the use of others, or who shall knowingly permit any other person to take, purloin, secrete or in any way appropriate to his own use, or the use of others, any money, coin, bills, notes, credits, choses in action or other property or article of value belonging to or deposited with or held by such person, firm, corporation, association, bank, trust company, financial institution or broker in whose employment such officer, agent, attorney, clerk, servant or em-

ployee may be, shall be deemed guilty of embezzlement, and, on conviction, shall be imprisoned in the state prison for any determinate period of not less than two (2) years nor more than twenty (20) years and in addition to such imprisonment he shall be fined not less than one dollar ($1.00) nor more than one thousand dollars ($1,000.00), and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period: Provided, That where the money, coin, bills, notes, credits, choses in action or other property or article of value, taken, purloined, secreted or appropriated shall be of the value of less than one hundred dollars ($100), the punishment may be imprisonment in the county jail or penal farm for a period not exceeding one (1) year and a fine not exceeding five hundred dollars ($500): And, provided, further, That upon a second such conviction for embezzlement the person convicted shall suffer the punishment prescribed for those convicted of embezzlement where the money or property taken is of the value of one hundred dollars ($100) or over."

Rule 2-40B of the Indiana Supreme Court reads as follows:

"Rule 2-40B. Correction of Sentence. Whenever it shall appear from the indictment or affidavit and final judgment in any criminal cause that an erroneous sentence has been imposed by the trial court, the defendant in such cause may at any time petition the trial court to correct retroactively such judgment to conform to the term of imprisonment specified in the applicable statute upon proper notice (By serving a copy of the petition in person or by mail) upon the Prosecuting Attorney of the circuit and the Attorney General of Indiana. An appeal may be taken to the Supreme Court from a final order granting or denying said petition under the same rules and conditions as provided in rules 2-40 and 2-40A of this Court. Effective November 16, 1954."

CONCISE STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

A.

NATURE OF THE CASE AND ITS DISPOSITION IN THE CIRCUIT AND SUPREME COURT OF THE STATE OF INDIANA.

The facts of this case are briefly summarized as follows, viz: that Arnold G. Hobbs, petitioner was indicted and charged with embezzeling $1,600.00, which indictment was based upon the embezzlement statute which provides for penalties of a determinate sentence of not less than two (2) years nor more than twenty (20) years and a fine of not less than $1.00 nor more than $1,000.00.

Trial was had by a jury, and the jury returned a verdict finding the defendant guilty as charged and that his age was 33 years.

Over the objections of the petitioner, the trial judge, the Hon. William Schannen, Judge of the Allen Circuit Court, Allen County, Indiana, where said cause was tried, sentenced this petitioner to 15 years imprisonment in the Indiana State prison and fined him $1,000.00 and costs.

Petitioner, in his petition for writ of habeas corpus, charges that under the determinate sentence provisions of the statute, under which he was tried, it was the duty of the jury to fix the punishment, and in the absence of the jury fixing the punishment, only the minimum sentence was intended.

Petitioner further contended that the verdict of the jury only gave the trial judge jurisdiction to impose a valid sentence on this petitioner of two years, plus one day for the fine, plus time for costs of the action, and all of the sentence imposed by said court in excess of this was void and beyond the jurisdiction of the court to impose.

Further, after the petitioner had served his valid sentence in the Indiana State Prison of two years, plus one day for

the fine, plus time for costs, he was entitled to be released from custody of the said Ward Lane as Warden of the Indiana State Prison, and thereafter petitioner contended his restraint became illegal and he was then being illegally restrained of his liberty and entitled to be released by a writ of habeas corpus.

Accordingly, this action commenced as a petition for a writ of habeas corpus filed on the 19th day of September, 1963, by petitioner Arnold G. Hobbs, to contest the legality of his detention in the Indiana State Prison by the Warden, Ward Lane. The respondent, Ward Lane, was ordered by the LaPorte Circuit Court, LaPorte County, Indiana, to produce the petitioner in open court on the 4th day of October, 1963. (R. 3-30; App. B) On this date the respondent filed his motion to quash the writ of habeas corpus. (R. 31-34) Hearings were held and after oral argument, the motion to quash was overruled on November 22, 1963. (R. 36) On the 13th day of December, 1963, trial was held, evidence was submitted, and on the 16th day of December, 1963, the Hon Alban M. Smith, Judge of the LaPorte Circuit Court, found that the petitioner, Arnold G. Hobbs was being unlawfully detained and illegally restrained of his liberty. The court ordered the petitioner discharged from imprisonment and detention, and from custody of the said appellant, Ward Lane, as Warden of the Indiana State Prison, which order of release is set out in Appendix C; (R. 38-39).

The respondent filed his motion for new trial, which was overruled by the trial court. The respondent then perfected his appeal to the Supreme Court of the State of Indiana from the order and judgment of the LaPorte Circuit Court.

On the 24th of June, 1965, the Supreme Court of the State of Indiana, by majority decision, reversed the judgment of the LaPorte Circuit Court and ordered the appellee remanded to the custody of the respondent appellant as Warden of the Indiana State Prison. (R. 101-123; App. A) Petition for rehearing was timely filed on July 12, 1965, by the petitioner herein, and the petition for rehearing was denied, (R. 126) without written opinion, on the 22nd day of September, 1965. (R. 126-136) Notice of intention to appeal to the Supreme

Court of the United States was timely filed with service as provided by Rule 33 of the Supreme Court of the United States upon the Attorney General of the State of Indiana and Solicitor General of the United States. An extension of time for the filing of this petition for writ of certiorari was granted on December 14, 1965, and time was extended to and including the 19th day of February, 1966, by order of the Hon. Tom Clark, Associate Justice of the United States Supreme Court.

B.

THE STAGE, MANNER, METHOD AND DISPOSITION BY WHICH THE FEDERAL QUESTIONS, SOUGHT TO BE REVIEWED, WERE RAISED.

The first federal question before this court was raised in the initial stage of this proceedings and the manner in which it was raised was through the original verified petition for writ of habeas corpus instituting this action in the trial court, which petition is attached hereto and identified as Appendix B. The pertinent part of the petition raising the first federal question is as follows:

> "Comes now Arnold G. Hobbs, as the petitioner herein, and complains of the respondent, Ward Lane, as Warden of the Indiana State Prison, and for cause of action arising under the laws and Constitution of Indiana, and the 14th Amendment to the Constitution of the United States of America, petitions and says: ***"
>
> (R 4, Lines 1 to 5 incl.)
>
> "13. That on this date, namely September 19, 1963, this petitioner has now served in excess of four years and three months imprisonment under the terms of said commitment, which describes said judgment hereinbefore set out in this petition; that he has, therefore, served over and above any and all lawful punishments and penalties imposed by the jury in this cause and legally imposed by the trial court; that his present and continued imprisonment and restraint by respondent is wholly by authority

of the void portion of the judgment and commitment, which portion and particular judgment by the trial court was rendered without jurisdiction in this cause; that the petitioner's present imprisonment is, therefore, without right, illegal, and in violation of the due course of law provision of Article one, Section 12, Indiana Constitution, and also the due process and equal protection clause of the 14th Amendment of the Constitution of the United States."

(R 9, lines 9 - 25 incl.)

The full petition for habeas corpus is set out in the record pages 3-28 inclusive and appendix B.

That on the 16th day of December, 1963, the trial court passed upon this question in favor of the petitioner, by finding that he was unlawfully and illegally restrained of his liberty, and that said restraint was illegal and he was entitled to be discharged from imprisonment, detention and custody, and ordered him released as prayed for in his petition for writ of habeas corpus. The findings and order of said trial court are made a part hereof and marked Appendix C, and are found in the record at pages 38 and 39.

Upon appeal by the respondent, the Supreme Court of Indiana, by majority decision, ordered the judgment of the LaPorte Circuit Court reversed and the petitioner appellee remanded to the custody of the respondent. The decision is set out in Appendix A. (R 101 - 124, inclusive.)

The Supreme Court raised the second federal question in their opinion by holding that petitioner had to speak out during the trial. (record P. 104 L10 to L26) Petitioner contends that this is further error on the part of the Supreme Court of Indiana, because petitioner has a constitutional right to safely stand mute and seek his proper remedy at a time of his own choosing and a denial or attempted denial of such right constitutes a denial of his constitutional right under the 5th Amendment and 14th Amendment to the United States Constitution, and a violation of Article I, Section 14 of the Indiana Constitution.

REASONS FOR GRANTING THE WRIT.

I.

Rule 19A of the Supreme Court of the United States indicates that the consideration this court weighs in deciding whether to grant the petition for writ of certiorari is under circumstances where a state court has decided a federal question in substance not theretofore determined by this court, or has decided the question in a way probably not in accord with applicable decisions of this court. The decision of the Supreme Court of the State of Indiana is, as petitioner contends, a decision in part, not heretofore determined by this court, and also, in part, contrary to decisions of this court.

Petitioner contends that the Supreme Court of the State of Indiana has denied his constitutional rights by their decision entered in this case; first, the petitioner contends the Supreme Court of Indiana erred in their decision and denied this petitioner his constitutionally guaranteed right to a writ of habeas corpus by ordering him remanded to the custody of the respondent after he had been ordered released through a writ of habeas corpus by the trial court. The petitioner contends that he was entitled to the writ of habeas corpus under the circumstances in this case and the Supreme Court's order remanding him to custody is a denial of that right to habeas corpus. Also, by ordering him remanded to custody when no statutory procedure is provided for such an order as was entered by the Supreme Court of the State, and is therefore a denial of due process of law since no such law and procedure exists where he has previously been ordered released from custody by a trial court.

Further, By holding that petitioner was required to speak out during his original trial, which petitioner contends causes him to be required to act contrary to his constitutional rights.

First, petitioner feels that a presentation of the law explaining why his restraint is illegal and how he is entitled to habeas corpus is necessary.

The petitioner was indicted and tried on a count charging the embezzlement of $1,600.00 and he was tried in the

Allen Circuit Court by a jury for violation of the embezzlement statute being **Burns Ind. St. 1956 Replacements**, Sec. 10-1704, the pretinent part of which is:

> "***shall be deemed guilty of embezzlement and on conviction, shall be imprisoned in the state prison for any determinate period of not less than two years, nor more than 20 years, and in addition to such imprisonment he shall be fined not less than $1.00, nor more than $1,000.00***".

Since this statute provides for a determinate sentence, and the petitioner was being tried by a jury, another statute became directly involved, which is **Burns Ind. St. 1956** Replacement, Sec. 9-1819, the pertinent part of which is as follows:

> "***when the defendant is found guilty, the jury, except in the next three sections, (the indeterminate sentence law) **must state** in the verdict the amount of punishment to be inflicted***". (Emphasis ours)

The jury's verdict was:

"We, the jury, find the defendant, Arnold G. Hobbs, guilty, and that his age is 33 years.

Signed James Pletcher
Foreman."

The trial judge then proceeded, over the objections of this petitioner (R. 131 paragraphs numbered 3, 4, and 5) to sentence him to 15 years and fine him $1,000.00.

The petitioner contends that, by operation of law, the jury was to state the sentence and fine, and since their verdict was silent as to the fine and sentence, they meant that he was to be fined $1.00 and imprisoned for two years, the minimum that can be provided, plus time for costs.

In the case of **Palmer -vs- State**, 1929, 198 Ind. 73, 152 NE 607, the court said:

> "The court, after overruling the motion for a venire de novo, pronounced sentence on appellant that he

be imprisoned in the Indiana State Prison for the determinate period of 10 years. As that was the shortest period of time for which the jury lawfully could have found that he should be imprisoned, if he was guilty of the offense charged, appellant was not harmed by the failure of the verdict to fix the punishment, nor by the action of the court in overruling his motion for a venire de novo. The verdict finding him guilty of the offense of automobile banditry as charged in the indictment necessarily found that he should be imprisoned not less than 10 years."

The petitioner contends that the sentence he received was not an erroneous sentence but was part valid and part excessive and therefore separable. The excessive sentence theory is discussed in the case of **Shoemaker** -vs.- **Dowd**, 1953, 233 Ind. 602, 115 NE 2nd, 443, where at page 447, the following statement is given by Judge Bobbitt:

> "The rule is well settled that if a court having jurisdiction of the person and subject matter imposes a sentence which is merely excessive, such sentence is not void ab initio because of the excess, but is valid insofar as the power of the court extended, and is invalid only as to the excess, and under such a sentence habeas corpus will not lie to discharge the person in custody until he has served as much of the sentence as was in the power of the court to impose. However, after the authorized part of the sentence has been served, any further detention becomes illegal and may be reached by the writ."

This rule is set forth in **25 Am. Jur., Habeas Corpus**, Sec. 59, page 188 and **15 Am. Jur., Criminal Law**, Sec. 460 at page 119, **21 Am. Jur., 2nd, Criminal Law**, Sec. 536, Page 517, and in **15 Ind. Law Encyclopedia, Habeas Corpus**, Sec. 15, page 86.

The petitioner acknowledges that he was required to serve the minimum time for embezzlement, that being two years sentence, time for the fine, and costs of the trial. As soon as this time had been served, he then was entitled to

be released. He has always contended that this was a separable sentence. **Sperou** -vs- **United States** (1928) 24 Fed. 2nd 796, certiorari denied, 48 Sup. Ct. 559, 277 U. S. 596.

In the case of **United States -vs- Pridgeon,** 153 U. S. 48, the court said:

> "Where the court had jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack."

The court further said:

> "It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily or generally, vitiate the valid portion. By section 761, revised statutes, "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case (in habeas corpus) by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

However, the respondent continued to retain him in custody after he had served this time and he contends his restraint then became illegal. The writ of habeas corpus has been guaranteed by the Ind. Constitution, Article I, Section 27, and by the Constitution of the United States, under Article I, Sec. 9, part 2. A denial of this right by the state court is a denial of due process of law guaranteed under the 14th Amendment as well as a denial of habeas corpus guaranteed under Article I, Sec. 9, part 2 of the United States Constitution.

Next, even if his restraint was illegal, was he entitled to the writ of habeas corpus?

The statute in Indiana governing habeas corpus provides in **Burns Ind. St. 1946 Replacement,** Sec. 9-1901:

> "Who may have writ.—Every person restrained of

his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of the restraint, and shall be delivered therefrom when illegal."

Another statute on habeas corpus is **Burns Ind. Statutes, 1946 Replacement,** Sec. 3-1917:

> "Hearing—When party discharged.—The court or judge shall thereupon proceed, in a summary way, to hear and determine the cause; and if no legal cause be shown for the restraint or for the continuation thereof shall discharge the party."

The petitioner contended that his restraint was illegal and that he could use a writ of habeas corpus to inquire into this restraint. The petitioner presented his petition before the LaPorte Circuit Court, LaPorte County, Indiana, and relied on the law heretofore presented contending that the sentence was an excessive sentence under the definition given by Judge Bobbitt in **Shoemaker** -vs- **Dowd,** supra, and was excessive in the amount of 13 years and the sum of $999.00 fine. The LaPorte Circuit Court agreed with petitioner in his order on December 16, 1963, which was in part as follows:

> "***The court further finds that in the absence of the jury fixing the punishment, under the determinate sentence law, that the petitioner was only required to serve a minimum sentence of two years and $1.00 fine, plus the costs, and that the said petitioner has served now a period of four years, six months, and 14 days, which is in excess of the time provided for by the determinate sentence law of the State of Indiana, and that the petitioner was entitled to be released after serving two years, plus one day, plus time for costs of the trial, and that his restraint, after he was entitled to be released, is unlawful, and that the petitioner is now being illegally restrained of his liberty.***"

The court then proceeded to order the petitioner released from custody. Even the respondent agreed in his brief by stating that the judgment of the trial court is not assailed

as being contrary to law. This is quoted in the record p. 118 lines 11 to 15. On appeal, the Supreme Court of the State of Indiana, entered the following order:

> "The judgment of the trial court is reversed, with directions that appellee be remanded to the custody of the Warden of the Indiana State Prison." (R. 109 L 15-19)

There is no statutory procedure for the Supreme Court to directly order the petitioner remanded to the custody of the respondent when he has been released under a right granted by the Constitution.

The Supreme Court, in their decision, said that a rule of the Supreme Court, Rule 2-40B, is the procedure that the petitioner should follow.

Petitioner contends that the decision of the Supreme Court of the State of Indiana sets out a procedure that the court created; and by ruling that the petitioner has to follow the Supreme Court's rule procedure, rather than a constitutionally guaranteed right, and he is ordered returned to prison, effectively denies this petitioner the right to habeas corpus granted to him by the Constitution of the State of Indiana and Article I, Sec. 9, part 2 of the United States Constitution. This rule uses the word **may** and by its wording is not a mandatory procedure.

The Supreme Court, by their decision in this case, requires procedure other than a constitutional right, and, whether this procedure is a proper one or not, if it is required to be used in place of a constitutional right and a man, who has been released through a constitutional right, is ordered remanded to prison, this decision has the effect of denying the constitutional right by replacing it with a Supreme Court rule. This violates the sanctity of the Constitution and replaces constitutional rights.

Petitioner does not contend it is wrong if the legislature or court grants or creates additional remedies and/or adds on to those already granted by the constitution; what he does contend is error is the attempted **replacement** of constitutionally

granted rights and remedies created by the legislature, or the court's rule. This replacement is the denial of this petitioner's constitutional rights, by taking them away and replacing them with legislative rights. If a Supreme Court rule could be made effective in this case, when the rule has the same effect as a statute, the rule would have the effect of abolishing the right to the writ of habeas corpus. If this be true, the rule would be unconstitutional. The writ is not a statutory remedy in a strict sense of the term, but rather a remedy recognized and continued by the Constitution. **State ex rel Allen -vs- Fayette Circuit Court,** (1948), 226 Ind. 432, 81 NE 2d 683.

The legislature could enlarge the right, (so could the Supreme Court rule), but the Constitution prohibits any impairment of the right. **Witte -vs- Dowd,** (1951), 230 Ind. 485, 102 NE2d 630.

II.

Further the Supreme Court of the State of Indiana by its decision has held that the petitioner was not to stand idly by as a defendant in a criminal case when an error is being made by the court or by the prosecution.

Petitioner challenges this statement because, if such were the law, it violates his constitutional rights against self-incrimination afforded by Article I, Sec. 14 of the Constitution of Indiana, and the 5th Amendment of the United States Constitution, as set out by Chief Justice Jackson at record P. 119, lines 9 to 28 inclusive. (Appendix A)

The appellee respectfully challenges the majority decision as being further incorrect and unsound when the majority of the Supreme Court of Indiana stated:

> "***then go into another court through habeas corpus, asking that the judgment be declared void."
>
> (R. 104 lines 17 - 18)

At no place in the petitioner's original petition did he ever present and argue that this entire judgment was void.

Appellee further insists that the majority decision in this case denies him due process of law by going outside of the issues presented to the trial court.

The appeal in this case had to be decided on the facts in the record, not matters dehors the record.

As heretofore stated by this petitioner, the majority decision, in part, controvenes the ruling precedent of this court when this court said in **Malloy** -vs- **Hogan,** (1964), 378 U. S. 1, 84 Sup. Ct. 1489, quoted at page 1492, as follows:

> "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."

This same rule is further announced by this court in **Griffin** -vs- **California** (1965) ..... U. S. ....., 85 S. Ct. 1229.

CONCLUSION

The Constitution is the very backbone of our democracy and marks the difference between freedom and anarchy. It stands as a shining example to freedom-loving men everywhere. The absolute sanctity of the inalienable rights granted to all men through this document is imperative to continued freedom. The replacement, restriction, or hampering of any right by anyone must always be prohibited; or the eventual destruction altogether of this priceless document will be inevitable. This destruction begins in small, inconspicuous ways and must be nipped in the bud. For the reasons herein contained, the petitioner respectfully requests this honorable court to grant his petition for a writ of certiorari to the Supreme Court of Indiana.

Respectfully submitted,

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APPENDIX A

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IN THE
SUPREME COURT OF INDIANA

WARD LANE, as Warden of the Indiana State Prison, Appellant,	)	
vs.	)	No. 30648
ARNOLD G. HOBBS, Appellee.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
HON. ALBAN M. SMITH, JUDGE

ARTERBURN, J.

This is an appeal from the granting of a writ of habeas corpus by the LaPorte Circuit Court, which released the appellee, Arnold G. Hobbs, from the Indiana State Prison where he was committed to serve a fifteen year sentence by the Circuit Court of Allen County, Indiana for embezzlement.

After the jury's verdict of guilty, the court fixed the sentence of fifteen (15) years.

The appellee contends that the penalty fixed by the statute was a determinate period of not less than two (2) nor more than twenty (20) years, which it was the duty of the jury to fix instead of the court under the statute, and that therefore, after he had served the minimum of two years, he was entitled to be discharged from prison, since the court had no jurisdiction to fix any greater penalty than the minimum under the authority of **Witte v. Dowd, Warden** (1951), 230 Ind. 485, 102 N.E.2d 630 and **Shoemaker v. Dowd, Warden** (1953), 232 Ind. 602, 115 N.E.2d 443.

These cases are superseded by **Dowd, Warden** v. **Todd** (1962), 243 Ind. 232, 184 N.E.2d 4. There we reviewed and considered these cases and others like them in view of the new rule, 2-40B. This rule provides in substance that whenever it appears an incorrect sentence has been imposed, application may be made by the objecting party for the correction of the same to the court imposing the sentence originally, from which ruling an appeal may be taken to the Supreme Court. The rule, approved in 1954, made plain and certain the remedy when it is contended an erroneous sentence has been imposed. It did away with the fiction that the court lost "jurisdiction" to impose an erroneous or excessive sentence. We stated there (p. 236):

> "Far too frequently the term 'lack of jurisdiction' is loosely used and overworked as a catchall to support a desired remedy. From such a premise it is then argued that all actions of a court are 'void.' We cannot ascribe 'lack of jurisdiction' indiscriminately as a basis for achieving every remedy, however desirable.
>
> In the case before us the court had general jurisdiction of the subject matter, namely, the crimes involved. The court also had jurisdiction of the party involved. Under no theory can it be urged that there was lack of jurisdiction in the Marion Criminal Court, Division Two, or that the judgment was void. At the most, it was contrary to law and therefore erroneous . . ."

Later, this Court reaffirmed the operation of this rule and that the trial court retained jurisdiction to correct an erroneous sentence, rather than lost it by reason of any error.

> **Woods** v. **State** (1955), 234 Ind. 598, 130 N.E.2d 139.
>
> **Wagner** v. **State** (1963), 243 Ind. 570, 188 N.E.2d 914.

We again state that the remedy to correct an erroneous sentence is through Rule 2-40B and not by habeas corpus in another trial court under any theory that the trial court imposing the sentence had lost "jurisdiction".

It has never been the law in Indiana that one trial court may review the judgment or errors of another trial court by or through a writ of habeas corpus. In habeas corpus, one trial court may not go behind the judgment of another trial court. In the case before us we call attention to the fact that to review the judgment of the Allen Circuit Court, the La-Porte Circuit Court had to go back of the judgment into the record and view the jury's verdict. If it may do that, then it may review the motion for a new trial or another alleged intervening error. The judgment of the trial court merely reads as follows:

> "It is, therefore, ordered, adjudged and decreed by the Court that the said defendant, Arnold G. Hobbs, is guilty of the offense of Embezzlement, as charged in the indictment, and that he be and he is hereby committed to the custody and control of the Warden of the Indiana State Prison for a period of fifteen (15) years, and that he be fined in the penal sum of One Thousand ($1,000.00) Dollars, and that he pay and satisfy the costs herein taxed."

Applying the principles enunciated in **Dowd, Warden** v. **Todd (1962)**, 243 Ind. 232, 184 N.E.2d 4, the Allen Circuit Court had jurisdiction of such matter, namely, the trial of causes in embezzlement. It also had jurisdiction of the party involved and the judgment on its face was valid. If there was error occurring prior to the judgment, application must the made to the Allen Circuit Court for correction of its own error. Another trial court of coordinate jurisdiction under no theory of "lack of jurisdiction" may review or correct the action in a habeas corpus case. The Supreme Court of the State of Indiana was created for the purpose of finally determing errors in trial courts of this State, and Rule 2-40B so provides for such review in cases where an erroneous sentence has been imposed.

We further call attention to the fact that other remedies also were open to the appellee herein for correction of any alleged error in the sentence at the time the jury's verdict was returned. If he found it defective, prejudicial or in error,

it was his duty at that time to object, pointing out the alleged error in the trial court before the jury was discharged. Certainly he may not stand by silently and wait until after the statutes of limitation have run and then go into another court through habeas corpus, asking that the judgment be declared void. A party may not stand idly by, make no objections to what he considers prejudicial error in a trial or proceeding, and then attempt to claim error later in another proceeding in another court nor even on appeal in the same case. If a party makes no objection at the time when the alleged error can be corrected, he waives the alleged error or right to claim it later, even on appeal. Such a principle is only fair to the opposing party and to the court.

In **Myles** v. **State** (1955), 234 Ind. 129, 124 N.E.2d 205, we stated (p. 134):

> "There is no contention appellant was not represented by competent counsel, and assuming without deciding that each juror did not say it was his verdict, it was the duty of appellant to object to its return before the jury was discharged. If the court's intrinsic record did not correctly state the proceeding at the time the jury was polled, it was the duty of appellant to bring the matter into the record by a special bill of exceptions, . . ."

In **The State** v. **Arnold** (1895), 144 Ind. 651, 42 N.E. 1095, we stated (p. 660):

> ". . . We had occasion in the recent case of **May** v. **State, supra,** to consider the effect of a defendant's silence when a verdict is returned assessing punishment smaller than that prescribed, and we have no reason to deny the soundness of the conclusion there reached. His silence is a waiver of the irregularity. As ridiculous as it might appear that a defendant charged with crime should be required to object to an irregularity favorable to him, it is no more so than to permit him, after receiving the benefit of a diminished punishment, to ask that, by reason of that benefit, he be permitted to go scot-free."

In **Mountjoy** v. **The State** (1881), 78 Ind. 172, at page 175, the principle is summed up:

> ". . . The general rule in a criminal as well as in a civil cause is, that, where a party is present in court when a judgment is rendered against him, he can not complain of the judgment in this court, unless he has in some way reserved an exception upon it..."

In **Evans** v. **The State** (1898), 150 Ind. 651, 655, 50 N.E. 820, 821, it was pointed out as the "settled law in this State" that an objection and the issue based thereon as to any judgment or verdict "must be first presented to the court below" and "the objection must particularly point out the defect or mistake complained of, and ask that the same be corrected. . . . Unless this is done no objection can be made available for reversal here, however erroneous in form or substance such judgment may appear to be."

In **May** v. **State** (1894), 140 Ind. 88, 39 N.E. 701, it is said with reference to an irregular verdict in a criminal case: (p. 92)

> "The instances where the doctrine of waiver has been held to apply have been stated in Elliott App. Proced., section 290, as follows: 'Errors of the gravest character may be expressly or impliedly waived by a defendant in a criminal case. * * * Failure to object to the competency of a judge will operate as a waiver. An accused may waive his right to the benefit of the constitutional provision that he shall be confronted by the witnesses for the State. * * * Objections to the empaneling of the jury, to the qualifications and to the conduct of jurors are waived unless reasonably interposed. * * Misconduct of counsel in argument must be specifically and duly objected to or there will be a waiver. In almost every conceivable form the doctrine of waiver has been enforced in criminal cases, it has been enforced in respect to pleadings, in respect to changes of venue, and in respect to the admission and exclusion of evidence. * * It is entirely safe to say that many con-

stitutional rights, and all rights not constitutional, or not affecting the jurisdiction of the subject, may be waived.' "

The Court further made the statement in conclusion: (p. 94)

> "While our attention has not been called to a case directly in point, we believe that in principle and by the analogy of the cases cited, there can be no doubt that the failure of the appellant to ask that the verdict be corrected waived all right to assail the verdict for the irregularities complained of."

The appellee-defendant here made no prompt objections to the verdict in the trial court pointing out specifically the alleged defects or errors therein. These objections, if valid, should have been made at a time when the same could still have been corrected by the trial court; otherwise such objections are waived on appeal and certainly may not be raised in habeas corpus in another court of coordinate jurisdiction for the purpose of being reviewed or corrected.

There is still a further reason why the appellee cannot prevail in this case. The record shows that when he was sentenced for fifteen years by the trial court for embezzlement, he asked for pauper counsel and a transcript and the payment of all costs for an appeal. This was granted and the pauper appeal was filed in this Court. If he claimed any alleged error in the trial (including the alleged erroneous verdict), it was his duty to raise it in that appeal. He had his remedy. He had counsel at public expense. The record, however, shows that in a petition to vacate the appeal made by appellee-Hobbs and his attorney, it was stated that an agreement had been made with the prosecuting attorney representing the State that nineteen other charges against Hobbs would be dismissed and that Hobbs would "accept the judgment of fifteen years, fine and costs", as entered by the court.[1]

[1] Burns' Ind. Stat. Anno. § 9-3303 provides that trial courts, as well as the Supreme Court of this State "shall take judicial notice of all pleadings and records from the time of the filing of the affidavit or indictment upon which a conviction may be had to and including any proceeding of record had attacking the validity of any judgment of conviction, . . ."

The petition further stated:

> "That petitioner feels that it is to his best interests that he accept the said sentence of this court and said appeal to the Indiana Supreme Court be dismissed, this being upon the proviso that the pending nineteen criminal charges all be dismissed by the State of Indiana, to the end that further trouble and expense will be terminated and said sentence of this court accepted as by law provided."

The agreement which was signed by Hobb's attorney and the prosecuting attorney recited in part that it was the understanding of both parties

> "that said Arnold G. Hobbs desires to avoid any further publicity and shame on himself and his family and believing that it will be for the best that said appeal be withdrawn and vacated and that said Arnold G. Hobbs is willing to accept said judgment **as it now stands, . . .**" (Our italics)

Hobbs thereupon, through his attorney, filed a written application with the court, setting out that agreement, and asked that the appeal be dismissed. The appeal was dismissed on such representation in good faith.[2]

However, it appears that after the statutes of limitation had run against all of the offenses, including the nineteen charges above mentioned, the appellee-Hobbs now claims the judgment of the court fixing his sentence of fifteen years, which he accepted, is void. He went into another trial court for a writ of habeas corpus and asked to be released from prison. The LaPorte Circuit Court released him without authority on the erroneous theory that the Allen Circuit Court lacked jurisdiction. This was done contrary to Rule 2-40B and **Dowd, Warden** v. **Todd** (1962), 243 Ind. 232, 184 N.E.2d 4.

When the appellee-Hobbs made the agreement with the State to accept the fifteen year penalty, he had the advice of counsel and he was not in doubt as to its meaning or the

[2] Some questions having been raised relative to the conduct of appellee's counsel herein by some of the members of the Court, the same has been referred to the proper committee for review.

time he must serve and the benefits he was to receive. In making such an agreement and dismissing his appeal, he waived all possibility of having a reversal on appeal in the case pending in this Court on any errors, including that which he now claims is ground for voiding the judgment of sentence of fifteen years. He cannot have his cake and eat it. He is bound by his agreement. If we were to assume that the agreement was invalid, it would nevertheless, toll the statutes of limitation against all the criminal charges originally against him, since, by his act of agreeing to and then repudiating the same, he has obtained a delay in the prosecutions, just the same if by concealment or by fleeing to a foreign jurisdiction, he avoided prosecution for a time.

The judgment of the trial court is reversed, with directions that appellee be remanded to the custody of the Warden of the Indiana State Prison.

The clerk is directed to certify this opinion to the court below immediately.

LANDIS, J. CONCURS.
ACHOR, J. CONCURS WITH OPINION.
MYERS, J. CONCURS IN RESULT.
JACKSON, C. J. DISSENTS WITH OPINION.

APPENDIX A

IN THE SUPREME COURT OF INDIANA

WARD LANE, as Warden of the Indiana State Prison, Appellant,	)	NO. 30648
v.	)	
ARNOLD G. HOBBS, Appellee.	)	

ACHOR, JUDGE Concurring opinion.

The opinion by Arterburn, J. asserts that objections to a judgment or sentence "should have been made at a time when the same could still have been corrected by the trial court otherwise such objections are waived on appeal . . ."

This statement seems to imply that all right to correct an erroneous sentence is lost unless so asserted. In my opinion the implication of the above statement is not consistent with Rule 2-40B[1] and the opinions of this court. See: **Dowd, Warden v. Todd** (1962), 243 Ind. 232, 184 N. E. 2d 4.

The fact that this court, by adopting Rule 2-40B as a specific procedure for the correction of an erroneous sentence seems to indicate that the court intended to provide an independent procedure by which to correct the error other than by the regular procedure of new trial and appeal.

[1] "Whenever it shall appear from the indictment or affidavit and final judgment in any criminal cause that an erroneous sentence has been imposed by the trial court, the defendant in such cause may at any time petition the trial court to correct retroactively such judgment to conform to the term of imprisonment specified in the applicable statute upon proper notice [by serving a copy of the petition in person or by mail] upon the prosecuting attorney of the circuit and the attorney general of Indiana. An appeal may be taken to the Supreme Court from a final order granting or denying said petition under the same rules and conditions as provided in Rules 2-40 and 2-40A of this Court." Rule 2-40B.

The opinion of Judge Arterburn cites several cases as holding that a party who is present when an irregular judgment is rendered or an improper sentence passed against himself must object at the time of the error, if any question is to be preserved thereon. **Evans** v. **State** (1898), 150 Ind. 651, 50 N. E. 820; **State** v. **Arnold** (1895), 144 Ind. 651, 42 N. E. 1095; **Montjoy** v. **State** (1881), 78 Ind. 172.

It occurs to me that this interpretation of the above cited cases is not entirely warranted. For example in the Evans case, **supra,** the court actually held that:

> "The error, if any, committed by the court, was in rendering judgment on the verdict under the reformatory act of 1897, fixing the penalty for grand instead of petit larceny. Appellant made a general objection to the judgment, but did not point out any specific objection thereto, or move to modify the same so as to conform to the verdict. It is settled law in this State that the form or substance of a **judgment cannot be first presented to the court below by a motion to modify,** which must specify wherein it should be corrected and modified, and the objection must particularly point out the defect or mistake complained of, and ask that the same be corrected. If the court rules against the party asking such correction, such ruling of the court below must be assigned as error in this court. Unless this is done no objection can be made available for reversal here, however erroneous in form or substance such judgment may appear to be." (Cases cited.) (Our emphasis.)

I find no statement in that case to the effect that the defendant must object **at the time** when an irregular judgment is rendered or an improper sentence is passed against him. Rather, it seems that the ruling of the court in the Evans case, **supra,** is substantially in conformity with Rule 2-40B, **supra.**

I do agree that where the accused is represented by counsel and is charged with knowledge of the error at the time

of sentencing, his conduct with respect thereto may thereafter be such as to estop him from challenging the validity thereof. **Dowd, Warden v. Todd, supra,** provided that the determinate sentence imposed is within the scope of the indeterminate sentence, as provided by statute.

Where, as in this case, there was such knowledge, and the convicted defendant enters into an agreement in which he specifically accepted such a sentence and the state agreed to dismiss numerous cases filed against him on the basis of that agreement principles of res adjudicata and collateral estoppel should be effective to bar a belated petition to correct the sentence which, although erroneous, was not void.

APPENDIX A

IN THE

SUPREME COURT OF INDIANA

WARD LANE, As Warden of the Indiana State Prison,	)	
Appellant,	)	
v.	)	No. 30648
ARNOLD G. HOBBS,	)	
Appellee.	)	

DISSENT

JACKSON, C. J.

I am in disagreement with the conclusions and result reached in the majority opinion and dissent thereto.

Appellant in the argument section of its brief, paragraph VIII, makes the following argument:

> "In order to fully orient the court on the background of the instant case, Appellant will first set forth a brief synopsis of the case history.
>
> "On June 2, 1959, in the Allen County Circuit Court, the Appellee was convicted by a jury for the crime of embezzlement. The jury's verdict merely found the Appellee guilty; it did not set out the punishment. (See Tr., p. 26)
>
> "On June 2, 1959, the Allen Circuit Court sentenced the Appellee to fifteen (15) years in the Indiana State Prison. (See Tr., p. 26)
>
> "On September 19, 1963, the Appellee filed his Verified Petition for Writ of Habeas Corpus in the

LaPorte Circuit Court, and on October 4, 1963, Appellant filed his motion to Quash Appellee's Petition for Writ of Habeas Corpus. The LaPorte Circuit Court, after argument, overruled the Motion to Quash, thus forming the issue for this appeal.

"In the habeas corpus proceedings below, Appellee principally based his argument upon the case of **Palmer** v. **State** (1926), 198 Ind. 73, 152 N.E. 607, and **Shoemaker** v. **Dowd** (1953, 232 Ind. 602, 115 N.E. (2d) 443, and also upon Burns' Indiana Statutes (1956 Repl.), Section 9-1819.

"Succinctly stated, Appellee's theory in the LaPorte Circuit Court was this:

"Since the duty to set the punishment devolved upon the jury under Burns' Section 9-1819, **supra,** (the crime of embezzlement falling within the provisions of this statute), it was, therefore, outside the jurisdiction of the trial court to set the punishment at fifteen (15) years. Appellee relied upon the case of **Palmer** v. **State, supra,** which states that when the jury fails to assess the punishment in those cases where it is required to do so by statute, such failure does not make the verdict void, but rather through a legal fiction, the guilty verdict is held to necessarily imply that the jury has assessed the punishment at the minimum number of years for which penalty clause of the statute calls. Hence, it is Appellee's contention that the jury's silient (sic) assessment of the punishment means that technically under the authority of the aforementioned **Palmer** case, **supra,** the jury assessed his punishment at two (2) years; and thus, the Court acted beyond its jurisdiction in sentencing him to a greater number of years - fifteen (15), in the instant case. In short, Appellee concedes that the portion of the sentence up to two (2) years was valid, but that the remainder of his sentence was excessive and void. Appellee used the case of **Shoemaker** v. **State, supra,** and its attendant dicta in the court below for his contention

that that part of the sentence in excess of two (2) years was void."

Appellant's motion for new trial consists of two grounds, viz:

"1. The Court erred in overruling the Respondent's Motion to Quash."

"2. The finding of the trial court is contrary to law."

Appellant's Assignment of Error is the single ground:

"1. The Court erred in overruling Appellant's Motion For A New Trial."

Appellant at paragraph VI, page 44 of its brief states:

"Since the judgment of the trial court is not assailed by Appellant as being contrary to law in the instant appeal, Appellant therefore waives this cause in his Motion for New Trial; . . ."

The statute under which appellee was charged, tried and convicted in pertinent part reads as follows:

"Every . . . employee . . . of any . . . financial institution, . . . who, having access to, control or possession of any money . . . to the possession of which his employer is entitled, shall, while in such employment, take, purloin, secrete or . . . appropriate to his own use . . . any money . . . deposited with or held by such . . . financial institution . . . shall be deemed guilty of embezzlement, and, on conviction, shall be imprisoned in the state prison for any determinate period of not less than two (2) years nor more than twenty (20) years and in addition to such imprisonment he shall be fined not less than one dollar ($1.00) nor more than one thousand dollars ($1,000.00), . . ."

Acts 1935, ch. 233, §1, p. 1229, §10-1704
Burns' 1956 Replacement.

The determinate sentence statute in effect at the time of appellee's conviction reads in pertinent part as follows:

"Verdict—Assessment of fine or punishment.—When the defendant is found guilty the jury, except in the cases provided for, in the next three (two) sections, must state, in the verdict, the amount of fine and the punishment to be inflicted; where the plea is guilty, or the trial is by the court, the court, subject to the same exception, shall assess the amount of fine and fix the punishment to be inflicted."

Acts 1927, ch. 200, §1, p. 574, §9-1819, Burns' 1956 Replacement.

The majority opinion is predicated on the theory that the remedy of habeas corpus is not available to the appellee in the instant case due to the intervention of Rule 2-40B and the case of **Dowd, Warden** v. **Todd** (1962), 243 Ind. 232, 184 N.E. 2d 4. A reading of the Rule (2-40B) and the **Dowd** case, **supra,** clearly indicates the procedure there outlined is applicable to the correction of an erroneous, not void, judgment.

In the case at bar the jury found the defendant guilty of the crime of embezzlement, the verdict did not fix the punishment as required by §9-1819, Burns' 1956 Replacement, **supra**; hence the verdict could only be construed as giving the trial court legal jurisdiction to impose on appellee only the minimum sentence of two years, plus $1.00 fine and the costs of the action. At the time this cause was tried the two statutes previously mentioned, §10-1704 and §9-1819 Burns', **supra,** were in full force and effect and must be construed together. When the trial court imposed on appellee a sentence of fifteen (15) years and a fine of $1,000.00, the excess of thirteen (13) years imprisonment and the fine in the excess sum of $999.00, was beyond the jurisdiction of the court under the verdict to impose, and was in direct contravention of the statute. Thus, the judgment of the court did not conform to the verdict of the jury nor the statutes of the State of Indiana, and that portion of the trial court's sentence which exceeds the minimum sentence of two years and the minimum fine of $1.00 is completely void. The validity of the judgment extends only to that portion of the sentence provided by law, **i.e.,** two years and $1.00 fine plus costs, everything in excess

thereof is illegal, absolutely void, beyond the jurisdiction of the court, and may be attacked and vacated by means and way of the constitutionally guaranteed right to a writ of habeas corpus.

United States v. **Lynch** (1947), 159 F.2d 198;

Shoemaker v. **Dowd, Warden** (1953), 232 Ind. 602, 115 N.E.2d 443;

Hunnicutt v. **Frauhiger** (1927), 199 Ind. 501, 158 N.E. 572;

15 I.L.E., Habeas Corpus, §15, Excessive Sentence;

29 C.J.S., Habeas Corpus, §26(3).

The attempted application of the theory enunciated in Dowd, Warden v. Todd (1962), 243 Ind. 232, **supra,** to the case at bar is inappropriate, unlawful, inapplicable and amounts to a prostitution of the principles of jurisprudence. I point out that I dissented in **Dowd, Warden** v. **Todd, supra,** and subsequent events have served only to confirm my belief that the majority opinion in the Dowd case was bad law, and that the judgment there appealed from should have been affirmed. In **Dowd, Warden,** v. **Todd, supra,** the central issue was the determination that a lesser crime was included in one of greater magnitude. That question is not involved in the case at bar, hence the **Dowd** case lends no support to the majority opinion. The finding and verdict of the jury could lead to only one judgment, in the instant case, under the indeterminate sentence statutes of Indiana. Assuming arguendo that at the time of the rendition of the judgment of conviction that the judgment could have been corrected by resort to Rule 2-40B, the corrected judgment would under the statute, have been limited to two years imprisonment ,the imposition of a fine of $1.00 and costs, for the jury did not by its verdict specify the term of incarceration or the amount of the fine. That part of the judgment in excess of two years imprisonment and $1.00 fine and costs is invalid and void, and being so the remedy is by resort to the constitutionally guaranteed right to a writ of habeas corpus.

Appellant has waived the second specification or ground of his motion for new trial, namely that, "(t)he finding of the trial court is contrary to law.", and has stated in its brief, ". . . the judgment of the trial court is not assailed as being contrary to law in the instant appeal, . . ." The effect of such waiver and statement is tantamount to the appellant confessing that the findings of fact and judgment of the LaPorte Circuit Court is valid in every respect and is an admission of the accuracy and validity of the judgment of the LaPorte Circuit Court in ordering the appellee released from custody. Further, by its waiver of such specification of its motion for a new trial appellant has removed all questions of law concerning the validity of the judgment of the LaPorte Circuit Court from consideration in this appeal and the corner stone of the majority opinion, that of the applicability of the **Dowd, Warden** v. **Todd** (1962), 243 Ind. 232, 184 N.E.2d 4, from consideration in this appeal.

2 I.L.E. Appeals, §423, Compliance or Acceptance of Benefits;

Arnold v. **Haberstock** (1937), 213 Ind. 98, 10 N.E.2d 591, 11 N.E.2d 682.

I agree with the statements in Judge Achor's separate opinion as contained in the first six paragraphs of such separate opinion. A defendant's right to a writ of habeas corpus remains unimpaired under the circumstances present in the case at bar.

Notwithstanding erroneous dicta and ill considered opinions to the contrary, the statutes and the constitution of the State of Indiana require the State to prove every element of crime charged beyond a reasonable doubt and the defendant is not required at any time to take any affirmative action to protect and preserve his constitutional rights. There is no statutory or constitutional requirement that a defendant has a duty to object at the time of its rendition to a defective, prejudicial, erroneous or void judgment. He may with equanimity and safety stand mute and thereafter at such time as he chooses seek his proper remedy, and the denial or attempted denial of such right constitutes a violation of his constitu-

tional rights under both the State and Federal Constitutions, and in addition thereto constitutes a violation of his civil rights under:

Constitution of the United States, Amendments 5, 14;

Constitution of Indiana, Art. 1, §21;

Malloy v. Hogan (1964), 378 U.S. 1;

Griffin v. California (1965) ..... U.S. ....., (foot note 5).

The majority opinion in the concluding two or three pages leans heavily and relies greatly on the alleged agreement of the appellee and the prosecuting attorney to accept the judgment of the Allen Circuit Court as an estoppel of his right to the remedy of habeas corpus.

We point out that the so-called agreement on which the majority relies was not and is not a part of the record before us on appeal. Even if the so-called agreement were a part of the record, resort thereto shows appellee signed such agreement and ". . . . said **sentence of this court accepted as by law provided.**" (Emphasis supplied.) The appellee, Arnold Hobbs, accepted the jurisdiction of the court to levy a sentence as provided by law. He has served that sentence and more and has fully complied with the agreement. All of the sentence greater than the minimum of two years and a fine greater than $1.00 and the costs of the action is void, and with it any extra legal provisions contained in the alleged or purported agreement. We further point out that reference to such agreement, much less reliance thereon by the majority of the court, is in derogation, denial and defiance of its own rule which does not permit questions to be raised for the first time on appeal, and the appellant raised the issue of the alleged agreement for the first time in oral argument before this court on the 6th day of May, 1965.

Horton v. State (1964), ... Ind. ....., 197 N.E.2d 297;

Tait v. State (1963), 244 Ind. 35, 188 N.E. 2d 537;

McKay v. Carstens (1952), 231 Ind. 252, 108 N.E.2d 249.

A habeas corpus proceeding being a civil action and this action being an appeal from a judgment of the LaPorte Circuit Court granting appellee a writ and his discharge the foot note one (being a reference to Acts 1947, ch. 189, §3, p. 6125, §9-3303 Burns' 1956 Replacement) of the majority opinion is not applicable to the case at bar as it applies to criminal actions and to specified special remedies not including habeas corpus.

The attempted casual dismissal of **Witte v. Dowd, Warden** (1952), 230 Ind. 485, 102 N.E.2d 630, as dicta by the majority seeks to avoid the applicability of the well settled law so well set forth in that opinion. Although the restatement of the law on habeas corpus in **Witte v. Dowd, Warden, supra,** did not force the release of Witte, it did once and for all state clearly that where the jurisdiction of the court is questioned and with it the capacity to render a valid judgment, this court on appeal can look behind the judgment to the record to determine the nub of the question, jurisdiction.

Miller v. Snyder (1854), 6 Ind. 1;

Smith v. Clausmeier (1893), 136 Ind. 105.

The attempt of this court to interpose a rule of court in a case where the question of a void judgment is raised merely by avoiding the use of the word "void" is in violation of Art. 1, §27, of the Indiana Constitution.

Ultimately, as in all endeavors, we come to the conclusion of the discussion of a case on the merits. That point has now been reached as we have herein heretofore point by point discussed and disposed of the points touched on in the majority opinion. I now point out that in actuality there is no appeal before this court in the case at bar. Why? The answer is simple, clear and concise. Appellant has waived specification two of his motion for new trial, in writing in its brief, and further therein makes this statement at page 44 of its brief, "VI . . . the judgment of the trial court is not assailed by the appellant as being contrary to law in the instant appeal...",

and again on page 44 of its brief it says, "VII. The sole error relied upon by Appellant in this appeal is that the trial court erred in overruling Appellant's Motion to Quash the Appellee's Writ of Habeas Corpus." Appellant by its waiver and abandonment of its second specification of its motion for new trial recognized by its statement ". . . the judgment of the trial court is not assailed . . ." and thereby acknowledges the validity and the correctness thereof. Hence, if the action of the trial court in overruling the motion to quash was erroneous, the judgment of the trial court would of necessity be "contrary to law." Appellant cannot, after its waiver and its admission thereby that the judgment of the LaPorte Circuit Court is in all respects valid, proper and binding on all parties to that action, now sneak in the back door and collaterally attack such judgment by asserting one of the processes by which the judgment was reached was erroneous. The ruling on the motion was merged in the judgment as previously pointed out, consequently in fact as well as in law, the legal effect of appellant's admission as to validity of the judgment took out with such admission the first specification of the motion for new trial, "(t)he Court erred in overruling the Respondent's Motion to Quash," and its sole Assignment of Error that (t)he Court erred in overruling Appellant's Motion For A New Trial", consequently there is here no valid appeal and the judgment of the LaPorte Circuit Court must stand uncontroverted and unchallenged in complete validity, integrity and with full force and effect.

Arnold v. **Haberstock** (1937), 213 Ind. 98, 10 N.E.2d 59;

Poffinbarger v. **Sumner** (1917), 186 Ind. 597, 117 N.E. 646.

The judgment of the LaPorte Circuit Court should be affirmed.

APPENDIX B

STATE OF INDIANA)		IN THE LAPORTE
COUNTY OF LAPORTE)	SS:	CIRCUIT COURT
		LAPORTE, INDIANA
ARNOLD G. HOBBS		)
Petitioner		)
		)
V		) CAUSE NO.
		)
WARD LANE, as Warden of		)
the Indiana State Prison,		)
		)
Respondent		)

VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS

TO: The Honorable Alban M. Smith, Presiding Judge of the above entitled Court.

Comes now ARNOLD G. HOBBS, as the Petitioner herein, and complains of the Respondent, WARD LANE, as Warden of the Indiana State Prison, and for cause of action arising under the laws and Constitution of Indiana and the 14th Amendment to the Constitution of the United States of America, petitions and says:

1. That the petitioner was indicted by the Grand Jury of Noble County, Indiana, said grand jury indictment based upon Burns 10-1704, upon a charge of embezzlement, a certified copy of which said indictment is filed herewith, made a part hereof, and marked Exhibit "A".

2. That thereafter the venue of this cause was changed to the Circuit Court of Allen County, Indiana, and upon arraignment the petitioner entered a Plea of Not Guilty and demanded trial by jury as provided by the Constitution of the State of Indiana.

3. That thereafter on the 27th day of May, 1959, a jury was duly impaneled, and sworn to try said cause, certi-

fied copies of said Order Book showing said proceedings beginning with the beginning of said trial, on May 27, 1959, to and including the final verdict and judgment, are attached hereto, made a part hereof, and marked Exhibit "B".

4. Petitioner further avers that on the 2nd day of June, 1959, as shown by Exhibit "B", aforesaid, that pursuant to the constitution of the State of Indiana, the jury duly impaneled returned the following verdict:

> "We, the jury, find the defendant guilty and that he is 33 years of age. Signed James E. Pletcher, Foreman."

5. Petitioner further says that thereafter the presiding trial Judge, the Honorable William E. Schannen, totally ignoring the verdict of the jury, which verdict by law imposed upon this petitioner the minimum sentence of only two years, under the **determinate** sentence law, with the fine of one dollar ($1.00), that said Judge did enter the following judgment, to-wit:

> "And the defendant now being asked if he has anything to say why sentence should not be pronounced, gives no sufficient reason.
> It is, therefore, ordered, adjudged and decreed by the Court that the said defendant, Arnold G. Hobbs, is guilty of the offense of Embezzlement, as charged in the indictment, and that he be and he is hereby committed to the custody and control of the Warden of the Indiana State Prison for a period of fifteen (15) years, and that he be fined in the penal sum of One Thousand Dollars ($1,000.00), and that he pay and satisfy the costs herein taxed."

6. Petitioner further says that thereafter a committment was issued upon said judgment and sentence and he was subsequently escorted to, and confined in, the Indiana State Prison, pursuant to said committment, which incarceration in said Indiana State Prison began June 17, 1959, and that this said petitioner has been confined continuously therein ever since and is now therein confined, and detained solely

under the authority of said committment, so issued on a judgment which is void in part.

7. That all time beyond the period of two years, which was imposed upon this petitioner by said Allen Circuit Court, is completely void and without legal force and effect and said court was without jurisdiction and authority to impose said additional 13 years and also was without authority or jurisdiction to impose a fine in excess of $1.00, and that the said respondent cannot justify further imprisonment and detention of this said petitioner thereunder, in that petitioner's continued confinement under color of the present committment of sentence is, therefore, contrary to the law and violative of the "Due Process" clause of the 14th Amendment of the Constitution of the United States of America, in that, since the Acts of 1927 were passed by the Indiana State Legislature and right up to this present day in Chapter 200, Acts 1927, page 574, INDIANA HAS PROVIDED FOR THE FIXING OF A PUNISHMENT FOR ALL CRIMES PUNISHABLE BY A DETERMINATE PERIOD OF TIME.

> "An act concerning public offenses and repealing all laws and parts of laws in conflict with the provisions of this act.
> **VERDICT:** Sec. 1 - Be it enacted by the General Assembly of the State of Indiana, That, when the defendant is found guilty, the jury, except in the next three (3) sections (the indeterminate sentence law) **MUST STATE,** in the verdict, the amount of fine and the punishment to be inflicted; where the plea is guilty, or the trial is by Court, the Court, subject to the same exceptions, shall assess the amount of fine and fix the punishment to be inflicted." See also: Burns' Ann. St. Rep. 1942, Sec. 9-1819:

8. Petitioner further avers that the illegality of his present detention and restraint by Respondent consists in the following matters, to-wit:

(a) That on May 1, 1957, the date alleged in the indictment as the time of offense charged, and at all times thereafter in this cause, certain constitutional and statutory

provisions applicable to this cause were in full force and effect in Indiana as follows:

> "Every . . . employee . . . of any . . . financial institution, . . . who, having access to, control or possession of any money, . . . to the possession of which his employer is entitled, shall, while in such employment, take, purloin, secrete or . . . appropriate to his own use . . . any money . . . deposited with or held by such . . . financial institution . . . shall be deemed guilty of embezzlement, and, on conviction, shall be imprisoned in the state prison for any determinate period of not less than two (2) years nor more than twenty (20) years and in addition to such imprisonment shall be fined not less than one dollar ($1.00) nor more than one thousand dollars ($1,000.00) . . ."

Burns' Indiana Statutes, Sec. 10-1704, 1956 Repl.

> "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, ..."

Article 1, Section 13, Indiana Constitution.

> "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

Article 1, Section 19, Indiana Constitution.

9. That petitioner's Exhibit "B" shows that this cause was submitted for trial to a jury, and that the jury had the absolute right and duty to fix the amount of fine and penalty to be imposed within the limits of Section 10-1704.

10. That the jury's verdict in this cause, being silent as to the punishment to be inflicted, and merely finding the petitioner herein guilty as charged in the indictment, was a verdict by which the jury intended to and did fix such punishment at the minimum prescribed in Section 10-1704, supra, namely, imprisonment for determinate term of two years and a fine of One Dollar ($1.00).

11. That under the law, following the verdict of the

jury, it became the mandatory duty of the trial judge to then pronounce a judgment and sentence in conformity with the verdict of the jury, and the verdict of the jury meaning and intending to be only for the minimum time, namely two years imprisonment and a fine of $1.00; that the actions of the trial judge in arbitrarily imposing a sentence of 13 years in excess of the jury verdict, and a fine of $999.00 in excess of the verdict of the jury, invaded the exclusive province of the jury, and that the record of said trial judge in attempting to impose 13 additional years imprisonment and $999.00 additional fine, was wholly without right, illegal and void; but that that portion of the judgment and sentence for two years imprisonment and $1.00 fine is valid and follows the verdict of the jury.

12. That that portion of said sentence and judgment being in excess of the verdict of the jury, as hereinbefore set out and charged, is wholly void, illegal and without color of right or authority.

13. That on this date, namely September 19, 1963, this petitioner has now served in excess of four years and three months imprisonment under the terms of said committment, which describes said judgment hereinbefore set out in this petition; that he has, therefore, served over and above any and all lawful punishments and penalties imposed by the jury in this cause and legally imposed by the trial court; that his present and continued imprisonment and restraint by respondent is wholly by authority of the void portion of the judgment and committment, which portion and particular judgment by the trial court was rendered without jurisdiction in this cause; that the petitioner's present imprisonment is, therefore, without right, illegal, and in violation of the due course of law provision of Article one, Section 12, Indiana Constitution, and also the due process and equal protection clause of the 14th Amendment of the Constitution of the United States.

14. Petitioner further avers that the LaPorte Circuit Court has jurisdiction to entertain this application for writ of habeas corpus and to grant relief as prayed for therein; and that said court, under the authority of the constitution

of the State of Indiana, has the power and authority to issue a writ of habeas corpus for the presence of this petitioner, upon the filing of said petition, and to inquire into the facts and matters set out in the Exhibits herein, which includes, and in fact is addressed specifically to that portion of the record of said Allen Circuit Court, upon which said committment under which the petitioner is restrained in his liberty, is absolutely void, without right, and of no force and effect in that the Allen Circuit Court, upon the jury being discharged by the imposition of the judgment of said court, lost all further jurisdiction of said cause, and the only jurisdiction the Allen Circuit Court had, after the verdict of the jury was returned, was to enter a judgment and sentence in conformity with the verdict of the jury; but said Allen Circuit Court was not a court of competent jurisdiction to impose and assess against Petitioner any term, punishment or penalty beyond and in excess of that authorized by said verdict; and that that portion of the term actually imposed in this cause in excess of that authorized by said verdict is **coram non judice** and void and the Respondent is without lawful authority to further detain Petitioner by virtue of such excess portion.

15. That petitioner is serving a true and complete copy of the instant petition to the Honorable Edwin K. Steers, Attorney General of Indiana and attorney for the Respondent in this cause, by United States Mail Service.

WHEREFORE, for each and all of the foregoing reasons, petitioner respectfully moves the Court to issue a Writ of Habeas Corpus to the Respondent, WARD LANE, as Warden of the Indiana State Prison, commanding him to produce the body of this petitioner in this Honorable Court at a date and time to be therein specified, to the end that due inquiry may be had into the matters herein alleged, and the said Arnold G. Hobbs be granted his freedom from further confinement and given a final discharge, in accordance with law and justice, and for all other proper relief in the premises.

Respectfully submitted,

/s/ Arnold G. Hobbs
ARNOLD G. HOBBS, #30600

Box 41
Michigan City, Indiana
/s/ Probst & Probst
PROBST & PROBST
Attorneys for petitioner
132 1/2 S. Main Street
Kendallville, Indiana

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

ARNOLD G. HOBBS, petitioner in the foregoing petition, who being first duly sworn upon his oath, deposes and says that he is the petitioner in the above matter, and that he has read all of said petition and all of said exhibits and that all of the contents are true to the best of his knowledge, information, and belief.

/s/ Arnold G. Hobbs
ARNOLD G. HOBBS

Subscribed and sworn to before me this 19th day of September, 1963.

/s/ Ralph W. Probst
Notary Public

(Seal)

My commission expires: Aug. 14, 1967

FILED
OCT. 22, 1958
Kenneth Barnum
Clerk Noble Circuit Court

Petitioner's Exhibit A-1-2

STATE OF INDIANA)
) SS:
COUNTY OF NOBLE)

CAUSE NO. 5286
IN THE NOBLE CIRCUIT COURT
SEPTEMBER TERM, 1958

THE STATE OF INDIANA)
) INDICTMENT FOR
VS.) EMBEZZLEMENT
)
ARNOLD G. HOBBS)

The Grand Jury of the county of Noble, in the state of Indiana, duly and legally impaneled, charged and sworn during the September term of the Noble Circuit Court for the year A.D., 1958, to inquire into felonies and certain misdemeanors in and for the body of said county of Noble, in the name and by the authority of the state of Indiana, upon their oaths do present that on or about the 1st day of May, 1957, at the county of Noble and in the State of Indiana, one Arnold G. Hobbs, being then and there the employee of the Noble County Credit Union, a financial institution, duly organized under the laws of the State of Indiana, and was employed by said Noble County Credit Union as its manager, and said Arnold G. Hobbs as such employee and manager and by virtue of being such manager and of such employment did then and there have access to, control and possession of certain money, to the possession of which said Noble County Credit Union was entitled, the said Arnold G. Hobbs did then and there, while such manager and in such employment unlawfully and feloniously, take, purloin, secrete and appropriate to his own use the sum of One Thousand Six Hundred Dollars.

Exhibit "A"

($1,600.00) which was then and there deposited with and held by said Noble County Credit Union, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

/s/ Louis G. Ketcham
Prosecuting Attorney
33rd Indiana Judicial
Circuit

A TRUE BILL
Edward C. Cureton
as Foreman, Grand Jury

Filed and recorded this 22 day of Oct. 1958.

/s/ Kenneth Barnum
Clerk, Noble Circuit Court

APPROVED BY ME:
/s/ Louis G. Ketcham
Louis G. Ketcham
Prosecuting Attorney
33rd Indiana Judicial Circuit

Witnesses:
Darwin Freck
Fay Palm
Carey Davis
Eva Belle Malott

Earl S. Ott

Attest:
The above and foregoing is a true and perfect copy of

Indictment

for

Embezzlement

State of Indiana

vs.

Arnold G. Hobbs 8676

as the same appears and remains on record in my office.
Witness my hand and seal this 16th day of September 1963

/s/ Elton L. Marquart
Clerk

(Seal)

No. 8676

CIRCUIT COURT

State of Indiana
vs.
Arnold G. Hobbs

CERTIFIED COPY OF
A Court Order

PLEAS before the Hon. William H. Schannen, Judge of the Circuit Court of Allen County, State of Indiana, at a regular term of said Court, held at the Court House in the City of Fort Wayne, County of Allen, State of Indiana, commencing on Monday, the ..... day of ..... A.D., 19...., to wit:

Petitioner's Exhibit
B-1-2-3-4-5-6

State of Indiana
vs. 8676
Arnold G. Hobbs

BE IT REMEMBERED, that on the 27th day of May A.D., 1959, the same being the 33rd Judicial day of the April Term, 1959, of said Court, held at the said Court House, before the Honorable Judge aforesaid, the following Order was made in the above entitled cause by said Court to-wit:

Comes now the State of Indiana, by Louis G. Ketcham, Prosecuting Attorney, Noble (sic) County, Indiana, and C. A. Lincoln, Special Prosecuting Attorney for Noble County, Indiana, and comes now the defendant, Arnold G. Hobbs, in person and by counsel, Ralph W. Probst, and this cause now being at issue, the same is submitted for trial to a Jury composed of the following named persons, to-wit:

James Pletcher	Irwin Shreve
Dwight Foulks	Paul F. Bender
Joseph Welling	Gordon E. Emrich
John J. Lohse	Henry Pliett
Glenn Ross	Harland B. Ford
Stanford Gerardot	Clair H. Reed

twelve good and lawful householders or freeholders of this County, and legal voters therein, duly impanelled and sworn to try the same.

Comes now the defendant herein and tenders four (4) preliminary instructions, which are in the following words and figures, to-wit: (H.I.). The Court now refuses to give defendant's preliminary instructions numbered 1 to 4 to the Jury.

The Court now gives to the Jury its preliminary instructions numbered 1 and 2, which preliminary instructions are in the following words and figures, to-wit: (H.I.).

Comes now the State of Indiana, by Louis G. Ketcham, Prosecuting Attorney, Noble County, Indiana, and makes its opening statement to the Jury.

Comes now the defendant, by Ralph W. Probst, Attorney, and makes his opening statement to the Jury.

Comes now the defendant and files motion for separation of witnesses, which motion is in the following words and figures, to-wit: (H.I.), and which motion is now by the Court denied.

Comes now the State of Indiana and introduces its evidence in part, and this cause is now by the Court continued for further evidence until May 28, 1959, at 9:00 o'clock A.M.

Exhibit "B-1"

STATE OF INDIANA, COUNTY OF ALLEN:

I, Elton L. Marquart, Clerk of the Allen Circuit Court, in and for said County and State, certify that the above and foregoing is a full, true, and perfect copy of A Court Order entered and signed in the above-entitled cause by said court, as the same appears and remains on record in Order Book 116, page 49 of said Court, in my office.

In Testimony Whereof, Witness my name and the seal of said Court hereto subscribed and affixed, at the City of Fort Wayne, this the 16th day of September A.D., 1963.

/s/ Elton L. Marquart
Clerk Allen Circuit Court

(SEAL)

No. 8676
Circuit Court

State of Indiana
vs.
Arnold G. Hobbs

CERTIFIED COPY OF
A Court Order

PLEAS before the Hon. William H. Schannen, Judge of the Circuit Court of Allen County, State of Indiana, at a regular term of said Court, held at the Court House in the City of Fort Wayne, County of Allen, State of Indiana, commencing on Monday, the ..... day of ..... A.D., 19...., to wit:

State of Indiana

vs. 8676

Arnold G. Hobbs

BE IT REMEMBERED, that on the 28th day of May A.D., 1959, the same being the 34th Judicial day of the April Term, 1959, of said Court, held at the said Court House, before the Honorable Judge aforesaid, the following court order was made in the above entitled cause by said Court to wit:

Comes now the State of Indiana, by Louis G. Ketcham, Prosecuting Attorney, Noble County, Indiana, and C. A. Lincoln, Special Prosecuting Attorney for Noble County, Indiana, and comes now the defendant, Arnold G. Hobbs, in person and by counsel, Ralph W. Probst, and this cause having been continued for further evidence, the hearing of evidence by the State is now resumed and not being concluded, this cause is now by the Court continued to May 29, 1959, at 9:00 o'clock A.M., for further evidence by the State.

Exhibit "B-2"

STATE OF INDIANA, COUNTY OF ALLEN:

I, ELTON L. MARQUART, Clerk of the Allen Circuit Court, in and for said County and State, certify that the above and foregoing is a full, true and perfect copy of A Court Order entered and signed in the above entitled cause by said court, as the same appears and remains on record in Order Book 116, page 51 of said Court, in my office.

In Testimony Whereof, Witness my name and seal of said Court hereto subscribed and affixed, at the City of Fort Wayne, this the 16th day of September A.D., 1963.

/s/ Elton L. Marquart
Clerk Allen Circuit Court

(SEAL)

No. 8676
CIRCUIT COURT

State of Indiana
vs.
Arnold G. Hobbs

CERTIFIED COPY OF
A Court Order

PLEAS before the Hon. William H. Schannen, Judge of the Circuit Court of Allen County, State of Indiana, at a regular term of said Court, held at the Court House in the City of Fort Wayne, County of Allen, State of Indiana, commencing on Monday, the ..... day of ..... A.D., 19...., to wit:

State of Indiana
vs. 8676
Arnold G. Hobbs

BE IT REMEMBERED, that on the 29th day of May A.D., 1959 the same being the 35th Judicial day of the April Term, 1959, of said Court, held at the said Court House, before the Honorable Judge aforesaid, the following Court order was made in the above entitled cause by said Court to wit:

Comes now the State of Indiana, by Louis G. Ketcham, Prosecuting Attorney, Noble County, Indiana, and C. A. Lincoln, Special Prosecuting Attorney for Noble County, Indiana, and comes now the defendant, Arnold G. Hobbs, in person and by counsel, Ralph W. Probst, and this cause having been continued for further evidence, the hearing of further evidence by the State is now resumed, and not being concluded, this cause is now by the Court continued until June 1, 1959, at 9:00 o'clock A.M.

Exhibit "B-3"

STATE OF INDIANA, COUNTY OF ALLEN:

I, ELTON L. MARQUART, Clerk of the Allen Circuit Court, in and for said County and State, certify that the above and foregoing is a full, true and perfect copy of A Court order entered and signed in the above entitled cause by said

court, as the same appears and remains on record in Order Book 116, page 54 of said Court, in my office.

In Testimony Whereof, Witness my name and the seal of said Court hereto subscribed and affixed, at the City of Fort Wayne, this the 16th day of September A.D., 1963.

/s/ Elton L. Marquart
Clerk Allen Circuit Court

(SEAL)

No. 8676
CIRCUIT COURT

State of Indiana
vs.
Arnold G. Hobbs

CERTIFIED COPY OF
A Court Order

PLEAS before the Hon. William H. Schannen, Judge of the Circuit Court of Allen County, State of Indiana, at a regular term of said Court, held at the Court House in the City of Fort Wayne, County of Allen, State of Indiana, commencing on Monday, the ..... day of ..... A.D., 19...., to wit:

State of Indiana
vs. 8676
Arnold G. Hobbs

BE IT REMEMBERED, that on the 1st day of June, A.D., 1959, the same being the 37th Judicial day of the April Term, 1959, of said Court, held at the said Court House, before the Honorable Judge aforesaid, the following Court Order was made in the above entitled cause by said Court to wit:

Comes now the State of Indiana, by Louis G. Ketcham, Prosecuting Attorney, Noble County, Indiana, and C. A. Lincoln, Special Prosecuting Attorney for Noble County, Indiana, and comes now the defendant, Arnold G. Hobbs, in person and by counsel, Ralph W. Probst, and this cause having been continued for further evidence, the hearing of evidence is now resumed.

Comes now the defendant and files motion to strike all evidence given by Darwin G. Freck, which motion is in the following words and figures, to-wit: (H.I.), and which motion is now by the Court overruled.

After further cross-examination of the witness Darwin G. Freck, the State rests.

Comes now the State of Indiana and gives rebuttal evidence in part, and this cause is now by the Court continued to June 2, 1959, at 9:00 o'clock A.M.

Exhibit "B-4"

STATE OF INDIANA, COUNTY OF ALLEN:

I, ELTON L. MARQUART, Clerk of the Allen Circuit Court, in and for said County and State, certify that the above and foregoing is a full, true and perfect copy of A Court Order entered and signed in the above entitled cause by said court, as the same appears and remains on record in Order Book 116, page 57 of said Court, in my office.

In Testimony Whereof, Witness my name and the seal of said Court hereto subscribed and affixed, at the City of Fort Wayne, this the 16th day of September A.D., 1963.

/s/ Elton L. Marquart
Clerk Allen Circuit Court

(SEAL)

PLEAS, before the Hon. William H. Schannen, Judge Allen Circuit Court, Allen County, State of Indiana, at a regular term of said court, held at the Court house in the City of Fort Wayne, County of Allen, State of Indiana, commencing on Monday, the ..... day of ..... A.D., 19...., to-wit:

State of Indiana
vs. 8676
Arnold G. Hobbs

BE IT REMEMBERED, that on the 2nd day of June A.D., 1959 the same being the 38th Judicial day of the April Term 1959, of said Court, held at the said Court House, before

the Honorable Judge aforesaid, the following Court order was made in the above entitled cause by said Court to-wit:

Comes now the State of Indiana, by Louis G. Ketcham, Prosecuting Attorney, Noble County, Indiana, and C. A. Lincoln, Special Prosecuting Attorney for Noble County, Indiana, and comes now the defendant, Arnold G. Hobbs, in person and by counsel, Ralph W. Probst, and this cause having been continued for the hearing of further rebuttal evidence, the hearing of further rebuttal evidence is now resumed and concluded and the State rests, and the defendant now rests.

At the conclusion of the evidence and before the commencement of the arguments of counsel, the State requests the Court to instruct the Jury wholly in writing, and tenders and requests the Court to give in its behalf, instructions numbered 1 to 13, both inclusive; and the Court indicates that it will give and read to the Jury of the aforesaid instructions tendered by the State, instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, and will refuse to give instruction numbered 6.

The Defendant requests the Court to instruct the Jury wholly in writing, and tenders and requests the Court to give, in his behalf, instructions numbered 1 to 13, both inclusive; and the Court indicates that it will read and give to the Jury of the aforesaid instructions tendered by the defendant, instructions numbered 1, 2, 3, 4, 6, 8, 12, and 13, and will refuse to give instructions numbered 5, 7, 9, 10, and 11.

The arguments of counsel are now had. At the conclusion of the arguments, the Court reads and gives to the Jury instructions numbered 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, and 13, tendered by the State, and refuses to give of said instructions tendered by the State, instruction numbered 6; and gives and reads to the Jury instructions numbered 1, 2, 3, 4, 6, 8, 12, and 13, tendered by the defendant, and refuses to give of said instructions tendered by the defendant instructions numbered 5, 7, 9, 10, and 11.

And all of said instructions are now signed and ordered filed and made a part of the record herein, (H.I.), all of which is accordingly done.

The Jury now retires for deliberation at 3:58 o'clock P.M. At 4:40 o'clock P.M. the Jury returns verdict in open Court in the following words and figures, to-wit:

Exhibit "B-5"

VERDICT

We, the Jury, find the defendant guilty and that he is 33 years of age.

(Signed) James E. Pletcher
Foreman

And the defendant now being asked if he has anything to say why sentence should not be pronounced, gives no sufficient reason.

"It is, therefore, orered, adjudged and decreed by the Court that the said defendant, Arnold G. Hobbs, is guilty of the offense of Embezzlement, as charged in the indictment, and that he be and he is hereby committed to the custody and control of the Warden of the Indiana State Prison for a period of fifteen (15) years, and that he be fined in the penal sum of One Thousand ($1,000.00) Dollars, and that he pay and satisfy the costs herein taxed.

Comes now the defendant, by counsel, and files motion in arrest of judgment, which motion is in the following words and figures, to-wit: (H.I.), and which motion is now by the Court set for hearing on June 8, 1959, at 9:00 o'clock A.M.

STATE OF INDIANA, COUNTY OF ALLEN:

I, ELTON L. MARQUART, Clerk of the Allen Circuit Court of Allen County, in and for said County and State, certify that the above and foregoing is a full, true and perfect copy of A Court Order entered and signed in the above entitled cause by said Court, as the same appears and remains on record in Order Book 116, pages 61 and 62, of said Court, in my office.

IN TESTIMONY WHEREOF, Witness my name and the seal of said Court hereto subscribed and affixed,

at the City of Fort Wayne, this the 16th day of September A.D., 1963.

/s/ Elton L. Marquart
Clerk

/s/ John W. Stellema
Clerk

(SEAL)

(R., p. 3, Line 26 to R., p. 27, Line 10)

APPENDIX C

STATE OF INDIANA)
) SS:
COUNTY OF LA PORTE) CAUSE NO. 30117-C

IN LA PORTE CIRCUIT COURT

DECEMBER TERM, 1963

ARNOLD G. HOBBS, Petitioner,

vs.

Ward Lane, as Warden of The Indiana State Prison.

ORDER

Comes now Arnold G. Hobbs, in person, and by his counsel, Probst and Probst, and comes also the Respondent by David S. Wedding, Deputy Attorney General of the State of Indiana, and the petition having been submitted to the court for hearing, without the intervention of a jury; witnesses sworn, evidence heard and the trial had, the court now finds that Arnold G. Hobbs was tried by a jury in the Allen Circuit Court upon the crime of embezzlement, and that the jury did not fix any punishment, but merely found the defendant guilty; that the Allen Circuit Court then entered a sentence of fifteen (15) years and a fine of one thousand dollars, plus costs; and that a commitment was issued by the Clerk of the Allen Circuit Court, pursuant to said sentence, and that the defendant was committed to the Indiana State Prison at Michigan City, Indiana;

The Court further finds that in the absence of the jury fixing the punishment, under the determinate sentence law, that the petitioner was only required to serve a minimum sentence of two years and one dollar fine, plus the costs; and that the said petitioner has served now a period of Four Years, six months and fourteen days which is in excess of the time provided for by the determinate sentence law of the State of Indiana, and that petitioner was entitled to be

released after serving two years, plus one day, plus time for costs of the trial, and that his restraint after he was entitled to be released is unlawful, and that the petitioner is now being illegally restrained of his liberty.

The Court further finds that said petitioner, by reason of said illegal restraint, is entitled to be released.

It is, therefore, ordered and adjudged by the Court that said Arnold G. Hobbs be, and he is hereby discharged from imprisonment and detention and from custody of said Ward Lane, as Warden of the Indiana State Prison.

/s/ Alban M. Smith
ALBAN M. SMITH, JUDGE

December 16th, 1963